

Let's Do Lunch: Court of Appeal Decision Under Review

By Greg S. Labate and Jonathan P. Barker

On July 22, 2008, California employers finally got the “free lunch” they deserved when the Court of Appeal issued its landmark decision in *Brinker Restaurant Corp. v. Superior Court* (see the online sidebar, “The Landmark *Brinker* Decision”). But this victory was followed by the California Supreme Court’s grant of review in the case on Oct. 22, 2008.

Until *Brinker* is finally decided, employers should continue to use policies that comply with a pre-*Brinker* interpretation of state wage and hour laws. Employees should verify in writing that they received these policies, and they should be provided with frequent written reminders of these policies.

So Now What Do We Do?

Brinker represented a welcome relief to employers. However, employers should not rejoice just yet, as the California Supreme Court will review this critical decision. Unless and until the *Brinker* decision is affirmed by the higher court, employers should exercise caution and take a conservative approach.

Waivers

Take advantage of the limited waivers allowed for first and second meal periods. If an employee works no more than six hours, the employee may waive the first meal period. If an employee works in excess of 10 hours but not more than 12 hours, and has taken a meal period during the shift, the employee may waive the second meal period. Obtain written waivers from employees.

Schedule meals and rests

Consider having set times for meal and rest periods each day.

Employers also might choose to add a “grace period” to the normal 30-minute meal period to ensure that employees do not take a meal period that is less than the required statutory time.

Timekeeping

Require employees to fill out time sheets daily themselves. Be wary of any timekeep-

ing system that has automatic deductions for meal periods, as they can fuel contentions that the system does not accurately reflect the time actually worked. Consider using a lock out timekeeping system that refuses to allow an employee to clock back in until 30 minutes have elapsed to ensure the meal period was long enough. For field employees, consider the benefit of using handheld computers (HHCs) or other remote timekeeping devices. If changes are made to time cards, keep notes on why those changes are made and have employees sign off on changes.

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Certifications

Use forms to certify that employees’ time card records are accurate, that employees took all required meal and rest periods, that they did not work off the clock, and that they complied with all company policies.

HR professionals also should be aware of A.B. 2075, which went into effect on Jan. 1, 2009, and prohibits the execution of a release that requires an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period when the employer knows the statement is false.

Training

Train managers on a regular basis as to the policies regarding meal and rest periods, and reinforce the importance of strict compliance with these policies. Also train non-exempt employees on these same issues. Keep records of all training.

Discipline

It helps to have evidence that the employer will discipline employees, including managers, for failing to comply with timekeeping procedures and meal and rest period policies.

Grievance procedures

Institute clear grievance procedures for employees to follow if they believe they have not been properly provided with their meal and rest periods. Identify specific positions that are a part of the procedures, and make sure that the procedures are regularly distributed to employees.

Paying for violations

When there has been a clear violation of the meal and rest period rules, consider paying employees for the violation to avoid an even greater liability in the future. Employers must pay one hour of wages for every day where there was a meal and/or rest period violation.

Audits

Regularly audit wage and hour practices to ensure compliance. Since this dynamic area of the law is complex, particularly in California, retain experienced labor counsel to conduct these audits.

Stay Tuned

Brinker is an important decision for all California employers. Employers should be on the lookout for the state Supreme Court’s review of this landmark case, and take all steps necessary to ensure compliance with California’s complex meal and rest period rules. ♦

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